No. 94-167

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

KATIA GUTIERREZ DE MARTINEZ, *et al.*,
Petitioners,

v.

DIRK A. LAMAGNO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF MICHAEL K. KELLOGG AS *AMICUS CURIAE* SUPPORTING THE JUDGMENT BELOW

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QUESTION PRESENTED

Whether the Attorney General's certification under the Westfall Act, 28 U.S.C. § 2679(d), that a government employee was acting within the scope of employment requires that the United States be substituted for the employee as the defendant in a civil action.

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INTEREST OF *AMICUS CURIAE*

On November 15, 1994, this Court invited Michael K. Kellogg to brief and argue this case, as *amicus curiae*, in support of the judgment below.

STATUTORY PROVISIONS INVOLVED

The Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), Pub. L. No. 100-694, § 6, 102 Stat. 4564, states in relevant part:

> (1) Upon certification by the Attorney General that the defendant employee was acting within the

scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General

to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

28 U.S.C. § 2679(d)(1)-(4).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Westfall v. Erwin*, 484 U.S. 292 (1988), this Court held that federal employees do not enjoy automatic immunity from state-law tort suits for conduct within the scope of their office or employment. Congress responded by enacting the so-called Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563. Under the Westfall Act, the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-2680 (1988 & Supp. 1993), is the exclusive remedy for injuries caused by the torts of federal employees acting within the scope of their employment. Upon certification by the Attorney General that an employee was acting within the scope of his employment with respect to the actions in question, the original defendant is dismissed from the suit, the United States is substituted as the defendant, and the suit proceeds against the government under the FTCA.

The question in this case is whether the Attorney General's certification as to scope of employment is reviewable in district court. May a district court, notwithstanding certification, conclude that the employee was acting outside the scope of his employment and, therefore, decline to substitute the United States as the defendant? That question must be answered in the negative.

A. The language and structure of the Westfall Act preclude such review. The Westfall Act states that when a case is brought against a federal employee in state court, "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose," the case "*shall be removed*" to federal court. In the district court, "[s]uch action or proceeding *shall be deemed* to be an action or proceeding brought against the United States . . . and the United States *shall be substituted* as the party defendant." 28 U.S.C. § 2679(d)(2) (emphasis added).

Congress's use of the word "shall" eliminates any discretion: "Congress could not have chosen stronger words to express its intent that [the specified action] be mandatory." *United States v. Monsanto*, 491 U.S. 600, 607 (1989). "By the plain language of 28 U.S.C. § 2679 (d)," therefore, "no discretion is given to the district court." *Johnson v. Carter*, 983 F.2d 1316, 1319 (4th Cir.) (*en banc*), *cert. denied*, 114 S. Ct. 57 (1993). *Accord Aviles v. Lutz*, 887 F.2d 1046, 1049 (10th Cir. 1989) ("The mandatory language of subsection (d) does not permit [courts] to challenge the attorney general's certification.").

The Westfall Act permits the district court to make a determination as to scope of employment only in a single instance: where the Attorney General "has refused to certify scope of office or employment." 28 U.S.C. § 2679(d)(3). In that case, the defendant employee may "petition the court to find and certify that the employee was acting within the scope of his office or employment." *Ibid.* But the Westfall Act makes no provision for judicial review at the behest of the plaintiff, if the Attorney General does certify. This "detailed mechanism for judicial consideration of particular issues at the behest of particular persons" reinforces that the statute precludes "judicial review of those issues at the behest of other persons." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984).

B. The legislative history of the Westfall Act confirms that district courts may not second-guess the Attorney General's certification. The now-superseded Federal Drivers Act, Pub. L. No. 87-258, 75 Stat. 539 (1961) (codified at 28 U.S.C. § 2679(d) (1982)), which the United States acknowledges "served as the model for the Westfall Act" (U.S. Br. at 20), expressly permitted district court review of the Attorney General's certification. The fact that Congress omitted this language from the Westfall Act, and replaced it with language mandating substitution of the United States for the employee, underscores that there is no judicial review of the certification decision. That is also the clear implication of the House Report that accompanied the Westfall Act, which states that the new Act will "*require* the United States to be substituted for a Federal employee as the sole defendant in a civil lawsuit *whenever* the Attorney General determines that the act or omission alleged to have caused the claimant's injuries was within the scope of the employee's office or employment." H.R. Rep. No. 700, 100th Cong., 2d Sess. 9 (1988) (emphasis added).

C. The non-reviewability of the certification decision is consistent with basic principles of agency law. Under the common law of agency, an employer can become liable for the acts of an employee by conceding that those acts are within the scope of employment. The court does not look behind such an admission to determine whether the admission *should* have been made (*i.e.*, whether the employee was actually acting within the scope of his employment). The certification process is akin to an admission by the United States that the employee was acting within the scope of his employment. The admission is binding upon the United States and causes the United States to be substituted as defendant in the suit.

In some instances, after the defendant employee drops out of the case, the United States will be able to dismiss the suit based on a retained immunity under the FTCA. *See United States v. Smith,* 111 S. Ct. 1180, 1185 (1991) (the Westfall Act "makes the FTCA the exclusive mode of recovery for the tort of a Government employee even when the FTCA itself precludes Government liability"). The lower court decisions permitting judges to second-guess the Attorney General's certification are, at bottom, simply an attempt to avoid the implications of this statutory scheme. They ignore a basic principle of agency law—the binding nature of an employer's admission as to scope of employment—so as to evade the retained immunities of the United States as employer.

D. The United States' reading of the statute also causes practical problems that undermine the policies of Congress. It invites plaintiffs, through "artful pleading," to "transform a job-related tort into a non-job-related tort simply by alleging, say an 'off-duty' state of mind (such as 'malicious' intent) or by alleging that a negligent action was carried out intentionally." *Wood v. United States,* 995 F.2d 1122, 1129 (1st Cir. 1993).

In such circumstances, a determination on the merits is effectively required before the immunity question can be resolved. In order to prove that he is entitled to immunity, because he was acting within the scope of his employment, the employee has to prove that he did not discriminate or harass or commit battery or slander (all torts that arguably cannot fall within the employee's scope of employment). Lower courts that accept the United States' reading of the statute have accordingly developed elaborate procedures to deal with the scope of employment issue. These mini-trials on the merits—with the consequent concerns about ultimate liability—defeat the Westfall Act's basic objective of avoiding "protracted personal tort litigation for the entire Federal workforce." *See* Westfall Act § 2(a)(5).

E. Finally, judicial review of the certification decision would raise a serious Constitutional problem. Under the United States' reading of the statute, certification is conclusive with respect to removal but not with respect to substitution. Thus, when a case is removed to federal court pursuant to Section 2679(d)(2), a federal court may determine that, notwithstanding certification, the defendant was acting outside the scope of his employment and therefore decline to substitute the United States as defendant. But then, even if there is no diversity and no federal question in the case, the court will be powerless to remand the action to state court. *See* 28 U.S.C. § 2679 (d)(2) (certification "shall conclusively establish scope of office or employment for purposes of removal").

The Article III basis for granting such jurisdiction is questionable, unless this Court adopts a theory of "protective jurisdiction," or ratifies a broad reading of *Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 738 (1924). Moreover, even if the statute, as interpreted by the United States, could scrape by under Article III—even if the Court decides that the Attorney General's certification alone (invalid though it may be) confers subject matter jurisdiction on the court—there is no reason to believe that Congress wanted to push the constitutional envelope so far. It would be unprecedented for Congress to *compel* a district court to retain jurisdiction over a purely state law case, simply because, at the outset of the case, the validity of the Attorney General's certification had to be determined.

The Court should accordingly decline the United States' invitation to twist the language, structure, history, and underlying policies of the statute, and to trample on basic principles of agency law, all in order to reach a result that itself would raise serious constitutional concerns.

ARGUMENT

THE ATTORNEY GENERAL'S CERTIFICATION UNDER 28 U.S.C. § 2679(d), THAT A GOVERNMENT EMPLOYEE WAS ACTING WITHIN THE SCOPE OF EMPLOYMENT, REQUIRES THAT THE UNITED STATES BE SUBSTITUTED FOR THE EMPLOYEE AS THE DEFENDANT.

A. The Language and Structure of the Westfall Act Preclude District Courts from Second-Guessing the Attorney General's Certification.

The United States, in its brief, relies heavily on a general presumption in favor of judicial review of executive action. *See* U.S. Br. at 16. But, aside from its striking inapplicability in this particular context (*see* sections C & D, *infra*), "[t]he presumption favoring judicial review . . . is just that—a presumption. This presumption, like all presumptions used in interpreting statutes, may be overcome by specific language" in the statute in question and "by inferences of intent drawn from the statutory scheme as a whole." *Block v. Community Nutrition Inst.*, 467 U.S. at 349. *See also, e.g., Southern Ry. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-63 (1979); *Schilling v. Rogers*, 363 U.S. 666, 670-77 (1960); *Morris v. Gressette*, 432 U.S. 491 (1977); *Switchmen's Union of N. Am. v. National Mediation Bd.*, 320 U.S. 297 (1943). Indeed, it is only "where substantial doubt about the congressional intent exists," based on the language and structure of the statute, that "the general presumption favoring judicial review . . . is controlling." *Block*, 467 U.S. at 349.

Here, there can be no doubt about congressional intent if words are given their normal meaning. The Westfall Act states that, "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, *any* civil action or proceeding commenced upon such claim in a United States

district court *shall be deemed* an action against the United States . . . and the United States *shall be substituted* as the party defendant." 28 U.S.C. § 2679(d)(1) (emphasis added). This mandatory language is repeated in subsection (d)(2) concerning removal of cases brought against employees in state court: upon certification by the Attorney General, the case "shall be removed," the action "shall be deemed" to be against the United States, and the United States "shall be substituted" as the party defendant. 28 U.S.C. § 2679(d)(2). *See also* 28 U.S.C. § 2679 (d)(4) ("Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) *shall* proceed in the same manner as any action against the United States") (emphasis added).

There is no wiggle room here. As this Court has explained, where the word "shall" appears in a statutory directive, "Congress could not have chosen stronger words to express its intent that [the specified action] be mandatory." *United States v. Monsanto*, 491 U.S. at 607. *Black's Law Dictionary* describes the term "shall" as "a word of command, . . . which must be given a compulsory meaning; as denoting obligation. The word in ordinary usage means 'must' and is inconsistent with a concept of discretion." *Black's Law Dictionary* 1375 (6th ed. 1990). Indeed, "[i]t has the invariable significance of excluding the idea of discretion." *Ibid.* Other sources are to the same effect.[1]

"By the plain language of 28 U.S.C. § 2679(d)," therefore, "no discretion is given to the district court." *Johnson v. Carter*, 983 F.2d at 1319. Once certification has occurred, substitution *shall* follow inexorably. "The man-

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[1] *See, e.g., Random House Unabridged Dictionary* 1757-58 (2d ed. 1993) ("Shall . . . (3) (in laws, directives, etc.) must; is or are obliged to"); *American Heritage Dictionary* 1125 (2d ed. 1985) ("Shall . . . c. Command . . . d. A directive or requirement."); *Webster's Ninth Collegiate Dictionary* 1081 (1987) ("Shall . . . b—used in laws, regulations, or directives to express what is mandatory").

datory language of subsection (d) does not permit [courts] to challenge the attorney general's certification." *Aviles v. Lutz,* 887 F.2d at 1049.

The United States tries to finesse the word "shall" in a way that merely reinforces it. The United States (Br. at 15) points out that "[t]he judicial rules governing joinder of parties are commonly phrased in mandatory terms." For example, Federal Rule of Civil Procedure 19(a) states that persons "shall be joined" if certain conditions are met, and Rule 24(a) states that "anyone shall be permitted to intervene" if certain other conditions are met. Despite the use of the word "shall" in each instance, the United States explains, "[p]arties are nevertheless entitled to challenge joinder on the ground that the legal and factual predicates for adding new parties have not been satisfied, and the federal district courts are responsible for resolving those questions." Br. at 15.

But the same is true here. The "legal and factual predicate" for substitution of the United States is certification. A plaintiff can certainly challenge substitution on the grounds that the Attorney General did not certify, and the federal district courts are responsible for resolving that question, just as they are responsible under Federal Rule of Civil Procedure 19(a) for determining whether the conditions for mandatory joinder have been met and under Rule 24(a) for determining whether the conditions for intervention of right have been met.

In each instance, the statute or rule itself describes the precise conditions which, if found to exist, mandate a certain result. Under Rule 19(a) there are certain express conditions which, if found to exist, require joinder.[2]

[2] Rule 19(a) provides:

> Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

Under Rule 24(a), there are certain express conditions which, if found to exist, require the court to permit intervention.[3]

Here, the only condition precedent to substitution of the United States enumerated in the statute is "certification." The statute does *not* state that "if the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose," the United States shall be substituted as defendant. If that were the case, then the district court would be responsible for resolving that question, and the reliance of the United States on Rules 19(a) and 24(a) would make some sense. But the Westfall Act looks only to the Attorney General's certification. Whether certification has occurred is the only event the district court is charged with determining.

[3] Rule 24(a) provides:

> Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

This natural reading of Section 2679(d) is also consistent with the structure of the Westfall Act. The Act permits the district court to make a determination as to scope of employment only in a single instance: where the Attorney General "has refused to certify scope of office or employment." 28 U.S.C. § 2679(d)(3). In that case, the defendant employee may "petition the court to find and certify that the employee was acting within the scope of his office or employment." *Ibid.* But the Westfall Act makes no provision for judicial review at the behest of the plaintiff, if the Attorney General does certify.

As this Court has noted, "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons [here, the defendant employees], judicial review of those issues at the behest of other persons [such as the plaintiffs] may be found to be impliedly precluded." *Block*, 467 U.S. at 349.[4] *See also Switchmen's Union of N. Am. v. National Mediation Bd.*, 320 U.S. at 300-01; *cf. Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 542 (1983). Or, as the United States (Br. at 20) so aptly explains, " 'it is generally presumed that Congress acts intentionally and purposely,' when it 'includes particular language in one section of a statute but omits it in another.' *City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994)."

Consistent with these principles, this Court appears to have previously read the statute as precluding review of the Attorney General's certification. *See United States v. Smith*, 111 S. Ct. 1180 (1991). The precise question at issue here was not presented in *Smith*. But, in discussing certification, the Court referred to "the *required* substitution of the United States as the defendant," *id.* at 1185 (emphasis added), and contrasted that with the situation in which the Attorney General declines to certify. "Once certification occurs," the Court explained, "the action 'shall be deemed an action against the United States [under the FTCA] and the United States shall be substituted as the party defendant.' Where the Attorney General refuses to seek certification, the Act permits the employee to seek a judicial determination that he was acting within the scope of his employment." *Id.* at 1184 n.5 (citations omitted).

[4] Here, of course, the Court does not have to rely on implied preclusion. While Section 2679(d)(3) expressly provides for judicial review at the behest of the defendant, Sections 2679(d)(1) and (d)(2), by their mandatory language, expressly preclude judicial review in other circumstances.

Indeed, letting a district court determine scope of employment even when the Attorney General does certify would render the certification process of (d)(1) and (d)(2) largely superfluous. The federal employee will always prefer to be replaced as defendant by the United States and therefore can always be expected to petition the Court for a ruling on scope of employment under (d)(3) if he or she has a colorable argument. If the fact of certification under (d)(1) or (d)(2) does not have conclusive effect on the question of scope of employment —if the district court can make its own determination on this issue, notwithstanding the Attorney General's certification—then all that is necessary to trigger the Court's determination is a petition under (d)(3). Certification under (d)(1) or (d)(2) becomes an empty formality.[5]

[5] The United States has argued in lower courts that the Attorney General's certification, although not conclusive, still warrants "substantial deference" and that the plaintiff, therefore, bears a heavy burden of proving that the defendant was acting outside the scope of her employment. *See, e.g.*, Brief of the United States at 22, *S.J. & W. Ranch, Inc. v. Lehtinen* (11th Cir. 1990) (No. 89-5990). But there is no apparent basis in the statute for such deference, and all the lower courts considering that argument have rejected it. *See Schrob v. Catterson*, 967 F.2d 929, 936 n.13 (3d Cir. 1992); *Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d 740, 745 (9th Cir. 1991); *Hamrick v. Franklin*, 931 F.2d 1209, 1211 (7th Cir.), *cert. denied*, 112 S. Ct. 200 (1991); *S.J. & W. Ranch v. Lehtinen*, 913 F.2d 1538, 1543 (11th Cir. 1990), *cert.*

The United States attempts to bolster its position by pointing to the fact that Congress "explicitly precluded judicial review of the certification decision with respect to removal" of cases from state courts. Br. at 20 (citing 28 U.S.C. § 2679(d)(2) ("This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal")). Since "Congress did not state . . . that the Attorney General's certification would also 'conclusively' establish the scope of office or employment for purposes of substitution," the United States argues (Br. at 20), it is "natural to conclude that Congress intended . . . that the courts would continue to have authority to review scope-of-employment certifications for purposes of substitution."

But, of course, Congress did—through use of the mandatory word "shall"—state that the Attorney General's certification would conclusively establish scope of employment for purposes of substitution. The fact that Congress added additional words to reinforce that point in the context of removal does not alter the evident meaning of the language used concerning substitution. To the contrary, it reinforces it. Removal—because it concerns the jurisdiction of the court—is most likely to spark *de novo* judicial review, notwithstanding the plain language of the statute. *See, e.g., Nasuti v. Scannell*, 906 F.2d 802, 808 (1st Cir. 1990) (citing "the district court's normal power to determine . . . the court's own subject-matter jurisdiction" as a reason for disregarding the language of the Westfall Act). In that context, where a court would otherwise be most likely to second-guess the Attorney General's determination, the statute underscores that review is not appropriate.

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denied, 112 S. Ct. 62 (1991); *Nasuti v. Scannel*, 906 F.2d 802, 808 (1st Cir. 1990). Once the United States abandons its mooring in the mandatory language of the statute, the Attorney General's certification is simply cast adrift, with no further relevance to the ultimate question of scope of employment.

Beyond this, the United States' attempt to bifurcate removal and substitution—whereby certification is conclusive for purposes of the one, but not of the other—is contrary to the logical framework of the statute. Under Section 2679(d)(3), which permits the defendant employee to petition for a finding by the Court as to scope of employment when the Attorney General declines to certify, the United States may (if the case is in state court) remove it to district court for a determination of scope of employment. "If, in considering the petition," the statute goes on to state, "the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court." 28 U.S.C. § 2679(d)(3) (emphasis added). In other words, Congress intended removal and substitution to go together. There is no indication that Congress wanted purely state law claims, without any diversity, based on actions outside the scope of employment, in cases in which the United States is not substituted as defendant, to be heard in federal court. Certification must be conclusive as to both removal and substitution, or neither. Since, as the United States correctly concedes (*see* pp. 33-34, *infra*), it must be conclusive as to removal, then it must be so with respect to substitution as well.

B. The History of the Westfall Act Confirms that District Courts May Not Second-Guess the Attorney General's Certification.

The nature of the current statutory scheme is highlighted by its difference from the now-superseded Federal Drivers Act, Pub. L. No. 87-258, 75 Stat. 539 (1961) (codified at 28 U.S.C. § 2679(d) (1982)), which the United States acknowledges "served as the model for the Westfall Act." Br. at 19.[6] The Federal Drivers Act made

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[6] For the convenience of the Court, the Federal Drivers Act is reprinted in full as an Appendix to this brief.

the FTCA the exclusive remedy for injuries "resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment." 28 U.S.C. § 2679(b) (1982). The Federal Drivers Act, like the Westfall Act, provided for certification of scope of employment by the Attorney General and stated that, upon such certification in a state court action, the action "shall be removed" to federal district court and "the proceedings deemed a tort action brought against the United States" under the FTCA. 28 U.S.C. § 2679(d) (1982). In other words, upon certification two consequences followed: removal of the case to federal court and substitution of the United States as defendant.

The United States notes (Br. at 19) that "district courts routinely resolved challenges to the Attorney General's certifications under the Federal Drivers Act when determining whether the case was properly removed and the United States was properly substituted as the defendant." The United States suggests (*id.* at 20) that "[i]f Congress had intended to depart from that established practice . . . and make the Attorney General's scope-of-employment certifications [under the Westfall Act] conclusive on the courts, one would expect that it would have done so explicitly."

What the United States rather surprisingly fails to mention, however, is that *the Federal Drivers Act itself expressly provided that the Attorney General's certification was reviewable, both for purposes of substitution and for purposes of removal. See* 28 U.S.C. § 2679(d) (1982):

> Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States [*i.e.*, it is not a case "resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment" (28 U.S.C. § 2679(b) (1982))], the case shall be remanded to the State court.

The fact that Congress omitted this language from the Westfall Act, and replaced it with language precluding judicial review, underscores what the plain language of the Westfall Act indicates: that there is no judicial review of the certification decision, with respect either to substitution or to removal. *See Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444 (D.C. Cir. 1988) ("Where the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning."), *cert. denied*, 488 U.S. 1010 (1989).

Under the Federal Driver's Act, substitution and removal were treated alike: if the certification was rejected by the district court then the United States was not substituted as a defendant and the case was remanded to state court. Under a proper reading of the Westfall Act, substitution and removal are also treated alike: certification is conclusive with respect to both. That is certainly the clear implication of the House Report that accompanied the Westfall Act. The Report notes:

> Section 6 would amend section 2679(d) of title 28 to *require* the United States to be substituted for a Federal employee as the sole defendant in a civil lawsuit *whenever* the Attorney General determines that the act or omission alleged to have caused the claimant's injuries was within the scope of the employee's office or employment. Once made, this determination also would *require* that any case filed in State court be removed to a Federal district court.

H.R. Rep. No. 700, 100th Cong., 2d Sess. 9 (1988) (emphasis added). There is no indication in the Report that, contrary to this mandatory language, the certification decision is reviewable. Nor, certainly, is there any indication that Congress intended to bifurcate the issues

of substitution and removal: the same language is used with respect to both. The only time that review of the scope-of-employment issue is mentioned is where "the Attorney General refuses to certify that an employee was acting within the scope of his office or employment." *Ibid.* In that instance, "the employee is authorized to petition the Court for a ruling on this determination." *Ibid.* There is no comparable reference to review at the behest of a plaintiff when the Attorney General does certify. Any member of Congress reading the report, like any member of Congress reading the statute, would conclude that no such review is permitted.

The United States claims that some snippets from the legislative hearings indicate a congressional "understanding" that the Attorney General's certification would be reviewable for purposes of substitution. U.S. Br. at 21 n.6. But the statements of one Congressman and one witness, buried in a 278 page hearing transcript, hardly rise to the level of a congressional "understanding." Moreover, the United States is simply wrong in stating that "[n]othing in the legislative history contradicts that understanding." *Ibid.*

Aside from the fact that a House Report lays greater claim to reflect congressional understanding than isolated statements in the legislative hearings, a more complete perusal of the hearings themselves is enough to disturb the United States' attempted "gestalt judgment as to what Congress probably intended." *Garcia v. United States*, 469 U.S. 70, 78 (1984). As originally drafted, the Act did not contain Section 2679(d)(3), which permits an employee to petition the Court for a ruling on scope of employment whenever the Attorney General declines to certify. *See* H.R. 4358, *reprinted in Legislation to Amend the Federal Tort Claims Act: Hearing on H.R. 4358, H.R. 3872, and H.R. 3083 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 2

(1988) ("*Hearing*"). Lois G. Williams, Director of Litigation of the National Treasury Employees Union, objected to the Act precisely because the Attorney General's certification decision was not subject to review. "The Attorney General's certification under the Federal Drivers Act is," Ms. Williams testified, "at least in some degree, reviewable by a court. . . . The proposed legislation, however, purports to remove any review." *Hearing* at 184. Ms. Williams expressed concern, on behalf of federal employees, that "if the Attorney General has sole discretion over the scope of duty questions, the appearance of conflict of interest is unavoidable in many cases. The representative of the government that will be liable for damages, should a case be proved, is empowered to decide whether the government or the employee will defend the suit, and perhaps who will pay the damages." *Ibid.*

In the colloquy that followed Ms. Williams' statement, Representative Barney Frank, the Chairman of the House subcommittee considering the legislation, expressed sympathy with Ms. Williams' concerns about employee defendants. He also indicated that he thought plaintiffs should "have the right to go into court and say, baloney, it was not within the scope of employment . . . ." *Hearing* at 197 (remarks of Mr. Frank). Chairman Frank then went on to say:

> Clearly we want this issue [of scope of employment] to be fairly litigated . . . . I think there would be agreement that that is the way we would want to go. . . . [I]f all of you would feel free to propose on that suggestion we will try to work it out.

The way the subcommittee "work[ed] it out," was by adding Section 2679(d)(3), which allows the defendant employee to challenge a failure to certify. H.R. Rep. No. 700 at 9. No comparable provision was added to permit the plaintiff to challenge the certification. Thus, whatever assumptions Chairman Frank might have expressed about "the way [the subcommittee] would want to go," the way

they went, and the way Congress as a whole went, was against any judicial review at the behest of the plaintiff in cases in which the Attorney General does certify scope of employment.

In short, the legislative history relied upon by the United States actually undermines the Government's position. Certainly, that history is not enough to override the language and structure of the statute.

C. The United States' Reading of the Westfall Act Ignores Basic Principles of Agency Law That Congress Showed No Intent to Override.

In the final analysis, without language or history to sustain it, the force of the United States' position reduces to a single sentence: "The proposition that a plaintiff cannot obtain judicial review of the Attorney General's scope-of-employment certification under the Westfall Act might," the United States claims, " 'excite some surprise.' " Br. at 17 (quoting *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835)). In other words, the question of scope of employment is important to litigants and one would, therefore, expect the courts to be the final arbiters of that issue. U.S. Br. at 17-18. But, even if it were consistent with the statute, that expectation would be wholly out of place in this context because it ignores basic principles of agency law.

Under the common law of agency, an employer can become liable for the acts of an employee by conceding that those acts are within the scope of employment. *Restatement (Second) of Agency* § 219 (1958). This is true even when the acts in question are torts. *Novick v. Gouldsberry*, 173 F.2d 496, 502-03 (9th Cir. 1949).

Ordinarily, of course, employers try to disavow that their employees were acting within the scope of employment at the time of an accident. The plaintiff, by contrast, seeking the deepest pocket around, argues that the employee *was* acting within the scope of employment. The

court then decides the question. *See* 5 F. Harper, F. James, Jr., & O. Gray, *The Law of Torts* 1-60 (2d ed. 1986). If, however, the employer concedes scope of employment or otherwise ratifies the employee's actions, there is nothing for the court to decide. Such an "admission" or "ratification" is a "speech act" that intrinsically carries certain consequences, such as potential liability for the torts of the employee. A court might determine that the speech act did not occur (*i.e.*, that the employer did not really admit scope of employment), but assuming that a valid admission has been made, the court does not look behind it to determine whether the admission *should* have been made (*i.e.*, whether the employee was actually acting within the scope of his employment).

It is reasonable to think that Congress would have wanted the same basic principle to apply here. As the United States acknowledges (Br. at 5), "[t]he FTCA incorporates principles similar to the common law doctrine of respondeat superior, which allows a plaintiff to sue a private employer for torts committed by employees acting within the scope of their employment."[7] The certification process is akin to an admission by the United States that the employee was acting within the scope of his employment. The admission is binding upon the United States and causes the United States to be substituted as defendant in the suit. The district court can determine whether the certification actually occurred, but it cannot look behind the process to determine whether it should have occurred. If there is a valid certification, if the United States makes this critical admission as to scope

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[7] *See also* Westfall Act, § 2(a)(2) (noting that the United States is "responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment").

of employment, then the United States must be substituted as defendant in the case.[8]

Ordinarily, under the common law, the employee does not get off the hook simply because the employer admits scope of employment. The plaintiff can proceed against both the employer and the employee, who are jointly and severally liable. *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 191 (5th Cir. 1989); *Restatement (Second) of Agency* §§ 343, 359c (1958). But that is exactly the situation that the Westfall Act was designed to change. *See* Westfall Act, § 2(a)(5)-(6) ("This erosion of immunity of Federal employees [created by the *Westfall* decision] has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire federal workforce. The prospect of such liability will seriously undermine the morale and well being of federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts."). Under the Westfall Act, whenever the United States admits scope of employment (through certification), the employee drops out of the case.

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[8] The Court dealt with these basic principles of agency law quite recently in *FEC v. NRA Political Victory Fund*, 63 U.S.L.W. 4027 (U.S. Dec. 6, 1994). In that case, a federal agency filed a petition for certiorari without authorization from the Solicitor General. The Solicitor General, while acknowledging that the agency had no authority to file the petition, attempted to ratify the filing after the fact. This Court explained that the propriety of the petition "is at least presumptively governed by principles of agency law and in particular the doctrine of ratification." *Id.* at 4030. The Court concluded that the Solicitor General did have authority to ratify the ultra vires act of the agency, but held that, because the time for filing a petition had passed before the Solicitor General ratified the act, the ratification was invalid. The Court certainly did not suggest that the merits of the Solicitor General's decision to authorize the petition would somehow be subject to review, if timely made.

The complicating factor under the Westfall Act is that, after substitution, the United States is not always subject to suit. In the normal FTCA case, of course, the United States' admission as to scope of employment is as much against interest as any employer's admission. But the United States has retained a number of immunities, such as for discretionary functions, for torts committed outside the United States, and for claims of libel, tortious interference with contracts, assault and battery, false imprisonment, and other enumerated categories. 28 U.S.C. § 2680. Thus, in some instances, after the defendant employee drops out of the case, the United States will be able to dismiss the suit based on a retained immunity under the FTCA.

Congress recognized this somewhat harsh consequence of substitution but still decided to immunize the employee. *See Smith*, 111 S. Ct. at 1185 (the Westfall Act "makes the FTCA the exclusive mode of recovery for the tort of a Government employee even when the FTCA itself precludes Government liability"). Suing the United States, Congress noted, has certain advantages, notwithstanding the retained immunities.

> From the perspective of a person injured by the official conduct of a Federal employee, the ability to sue the United States under the FTCA generally has distinct advantages over a suit against the individual Federal employee. The FTCA has an established administrative claims procedure through which many claims can be expeditiously resolved without costly litigation. And, perhaps most important the United States Government will be able to pay any judgment that is awarded, while an individual Federal employee may be "judgment-proof."

H.R. Rep. No. 700 at 4. *See generally Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989).

The burden of this benefit is that sometimes the plaintiff will not be able to proceed with his suit at all.[9]

At bottom, the various lower court decisions permitting judges to second-guess the Attorney General's certification are an attempt to avoid the implications of this statutory scheme. Because "[s]ubstitution of the United States as the defendant . . . not only immunizes the governmental employee but also may deprive the plaintiff of important procedural and substantive rights under state law," *McHugh v. University of Vermont*, 966 F.2d 67, 71 (2d Cir. 1992), these courts have concluded that the plaintiff should be able to obtain a judicial ruling on scope of employment. But such review refuses to give the admission of the employer as to scope of employment its usual force and effect. It ignores a basic principle of agency law—the binding nature of an employer's ratification of the actions of an employee—so as to evade the retained immunities of the United States as employer.

D. The United States' Reading of the Westfall Act Creates Serious Administrative Problems and Undermines the Policy Objectives of the Act.

In *Smith*, the Ninth Circuit had attempted to make the validity of a substitution turn on the immunities available to the government defendant. If the United States was immune it could not be substituted for the employee defendant. If the United States was not immune, it could be substituted. This Court rejected that approach.

Some courts of appeals are now attempting to reach the same result through the back door by ruling, first, that certification is reviewable and, then, that many of the

[9] In fact, however, there will often be an administrative remedy (as there is in this case) that the plaintiff will be able to pursue, notwithstanding the dismissal of the suit against the United States. *See* 21 U.S.C. § 904 (authorizing the settlement of tort claims that "arise in a foreign country in connection with the operations of the [DEA] abroad").

torts for which the United States has retained an immunity —generally, intentional torts—are, ipso facto, not within the scope of employment. *See, e.g., Nasuti*, 906 F.2d at 810 (assault and battery); *Wood v. United States*, 995 F.2d 1122, 1126 (1st Cir. 1993) (sexual harassment). "Although the tort and agency laws of the states vary, generally an intentional tort is regarded as falling outside the scope of employment—at least if the employee's conduct 'is different in kind from that authorized . . . or too little activated by a purpose to serve [the employer].'" *Kimbro v. Velten*, 30 F.3d 1501, 1505 (D.C. Cir. 1994) (quoting *Restatement of Agency (Second)* § 228 (1958)).

Thus, in order to escape the framework of the Westfall Act, and the implications of this Court's holding in *Smith*, plaintiffs simply need to allege torts that, because of their intrinsic nature, arguably cannot fall within the employee's scope of employment. *See, e.g., Nasuti v. Scannel, supra* (claim of negligent driving transmuted into alleged assault and battery); *Johnson v. Carter, supra* (disputed disciplinary action becomes claim for libel, slander, and intentional infliction of emotional distress); *Aviles v. Lutz, supra* (failure to promote becomes claim for defamation and tortious interference with employment rights). "[S]uch an approach," the D.C. Circuit has noted, "puts a premium on skillful pleading and is quite unfair to the employee defendant." *Kimbro v. Velten*, 30 F.3d at 1509. *See also Wood v. United States*, 995 F.2d at 1129 (plaintiff may "through artful pleading, transform a job-related tort into a non-job-related tort simply by alleging, say an 'off-duty' state of mind (such as 'malicious' intent) or by alleging that a negligent action was carried out intentionally").

Such an approach also effectively requires a determination on the merits before the immunity question can be resolved. "[T]he scope question and the merits in these sorts of cases often overlap—sometimes exactly." *Kimbro*

v. Velten, 30 F.3d at 1505. In order to prove that he is entitled to immunity, because he was acting within the scope of his employment, the employee has to prove that he did not discriminate or harass or commit battery or slander.

The lower courts that accept the United States' reading of the statute have accordingly developed elaborate and protracted procedural mechanisms for dealing with the scope of employment issue. As one court has explained, "[c]oncluding that judicial review is appropriate raises subsidiary but highly significant issues . . . such as when the scope-of-employment determination should be made (before or at trial); who should make it (court or jury); and whether any deference should be paid to the Attorney General's certification." *Brown v. Armstrong*, 949 F.2d 1007, 1011 (8th Cir. 1991). There is general agreement only on the last of these questions. The Attorney General's certification decision is reviewed de novo, without any deference. *See* n.5, *supra*. On the other questions, the courts are all over the map. One court has identified no fewer than four possible approaches to "resolving the issues presented when a plaintiff challenges the certification." *Melo v. Hafer*, 13 F.3d 736, 743 (3d Cir. 1994). The most commonly used of these approaches require discovery, followed by an evidentiary hearing. *See, e.g., Schrob v. Catterson*, 967 F.2d 929, 936 (3d Cir. 1992) ("if there is a genuine issue of fact material to the scope of employment question, the district court should permit discovery and conduct a hearing"); *S.J. & W. Ranch, Inc.* v. *Lehtinen*, 913 F.2d 1538, 1544 (11th Cir. 1990) ("On remand the district court should conduct a de novo hearing on whether defendant Lehtinen's conduct occurred within the scope of his employment and permit the plaintiff full recovery on the scope question.") (internal footnote omitted), *cert. denied*, 112 S. Ct. 62 (1991). Moreover, "[i]f the court, in the course of determining the substitution issue, necessarily finds facts that are part of the plaintiff's case on the merits, the defendant may be

estopped from disputing those facts at trial," *Melo v. Hafer*, 13 F.3d at 748 n.8, thus effectively forcing the defendant to stand trial on the ultimate issue of liability before immunity can be determined.[10]

Such a mini-trial on the merits—with all the consequent concerns about ultimate liability—defeats the Westfall Act's basic objective of avoiding "protracted personal tort litigation for the entire Federal workforce." *See* Westfall Act § 2(a)(5). *See also Barr v. Mateo*, 360 U.S. 564, 571 (1959) (the point of immunity is to avoid "suits which would consume time and energies which would otherwise be devoted to governmental service"). In passing the Westfall Act, Congress stressed the need for an "early resolution of the case" against the employee and the dangers of making immunity turn on a protracted "fact-based determination." H.R. Rep. No. 700 at 3. The United States' reading of the statute ignores these concerns. Granting conclusive effect to the Attorney General's certification, by contrast, allows the United States itself to determine the circumstances in which its employees' actions warrant immunity and, thereby, to pretermit any further proceedings against those employees.

Petitioners (Br. at 39) attempt to identify various constitutional problems with permitting the Attorney Gen-

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[10] Under another approach identified in *Melo*, 13 F.3d at 743, the court must "accept all of the factual allegations of the complaint as true and, after discovery and an evidentiary hearing where appropriate, determine any disputes of law or fact relevant to whether the defendant's conduct as alleged by the plaintiff is within the scope of the defendant's employment." Yet another, intermediate approach adopted by the court in *Wood*, 995 F.2d at 1129, accepts the plaintiff's allegation that "some kind of harm-causing incident" occurred, but allows the defendant to dispute the plaintiff's " 'characterization' or 'description' " of that incident. On these approaches, the defendant is not even entitled to dispute the core allegations of the plaintiff's complaint at the immunity stage, lest the plaintiff be stripped of his right to a jury trial. *Ibid.* In other words, immunity is completely subordinated to liability. As long as the complaint is artfully drawn, the defendant must stand trial and submit his fate to a jury.

eral's certification to be conclusive. Some lower courts are likewise sure that there is a problem, though precisely what that problem is is a matter of debate. Some see the issue as one of due process,[11] others as separation of powers,[12] still others equal protection;[13] one court has even suggested a taking.[14]

Significantly, the United States does not advance any of these arguments. To the contrary, the United States has expressly and quite properly rejected them elsewhere. "[S]tatutes calling for substitution of the United States for private defendants have routinely been upheld against constitutional challenge," the United States has noted, and "[t]here is no apparent reason why entrusting the determination of one factual predicate to such substitution to an Executive Branch official, as opposed to the courts, should raise issues of constitutional proportion." Brief for Appellee the United States at 20 n.11, *S.J. & W. Ranch v. Lehtinen*, No. 89-5990 (11th Cir. Feb. 5, 1990). *Accord Johnson v. Carter*, 983 F.2d at 1320 n.7. It is difficult to see any constitutional problem in requiring a district court to give the ordinary, common law force and effect to an employer's admission as to scope of employment. It is equally difficult to see such a problem in respecting the retained immunities of the United States.

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[11] *See, e.g., Meridian*, 939 F.2d at 744 ("leaving the final determination of scope to the Attorney General would allow an interested party to control a dispositive issue and would present possible due process implications").

[12] *See, e.g., Nasuti*, 906 F.2d at 813 ("there might be a separation of powers question if the statute were read to leave the Attorney General as the sole judge of an issue determinative of the jurisdiction of the federal court").

[13] *See, e.g., McHugh v. University of Vermont*, 966 F.2d at 74 (there is no valid reason "to give federal employees who are sued a judicial hearing on the scope of employment, as the Westfall Act explicitly does, while denying it to those who have sued them").

[14] *See McHugh*, 966 F.2d at 74 (tort claim is species of property).

E. The United States' Reading of the Westfall Act Creates an Article III Problem.

In contrast to the constitutional spectres raised by petitioners and by some lower courts, the United States' reading of the Westfall Act does raise a potentially serious Article III problem. As already noted, under the United States' reading of the statute, certification is conclusive with respect to removal but not with respect to substitution. Thus, when a case is removed to federal court pursuant to Section 2679(d)(2), a federal court may determine that, notwithstanding certification, the defendant was acting outside the scope of his employment and therefore decline to substitute the United States as defendant. But then, even if there is no diversity and no federal question in the case, the court will still be powerless to remand the action to state court. *See* U.S. Br. at 20 (citing *Aliota v. Graham*, 984 F.2d 1350, 1356 (3d Cir. 1993) (once a suit is removed under Section 2679(d)(2), the district court has exclusive jurisdiction and "has no authority to remand the case on the ground that the Attorney General's certification was erroneous"), *cert. denied*, 114 S. Ct. 68 (1993)).

Section 2679(d)(2), under the United States' reading, must therefore be treated as a naked grant of subject matter jurisdiction for all suits against federal employees where the Attorney General has issued a certification, notwithstanding a court finding that the certification is invalid. *Accord Aliota v. Graham*, 984 F.2d at 1357 ("subject matter jurisdiction is conclusively established upon the Attorney General's certification").

The Article III basis for granting such jurisdiction in cases involving purely state law claims, without any diversity, based on actions outside the scope of federal employment, is questionable. *See Kimbro v. Velten*, 30 F.3d at 1510 n.6 ("A determination that the employee's conduct was outside the scope of employment might strip the district court of Article III jurisdiction since whatever issues are left are state only."). As this Court has explained,

"pure jurisdictional statutes which seek 'to do nothing more than grant jurisdiction over a particular class of cases' cannot support Art. III 'arising under' jurisdiction." *Mesa v. California*, 489 U.S. 121, 136 (1989) (quoting *Verlinden B.V. v. Central Bank*, 461 U.S. 480, 496 (1983)).

The Third Circuit suggested that the statute, as construed by the United States, passes Article III muster because it "give[s] the government an unchallengeable right to have a federal forum for tort suits brought against its employees." *Melo v. Hafer*, 912 F.2d 628, 641 (3d Cir. 1990), *aff'd on other grounds*, 502 U.S. 21 (1991). But this Court has expressly declined to approve any such theory of "protective jurisdiction," based on a "generalized congressional interest in protecting federal officers from state court interference." *Mesa v. California*, 489 U.S. at 137.[15] Rather, the Court has indicated that the underlying suit must itself "raise[] questions of substantive federal law." *Verlinden B.V. v. Central Bank*, 461 U.S. at 493.[16]

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[15] Such a theory is also inconsistent with Section 2679(d)(3), which requires a remand to state court in cases in which a federal court declines to substitute the United States as defendant upon the petition of the federal employee.

[16] It is not sufficient for Article III purposes that the threshold substitution issue could be characterized as a question of federal law insofar as the standard for substitution (scope of employment) is set forth in a federal statute. As an initial matter, the district court will in fact be applying state law to determine scope of employment. *Williams v. United States*, 350 U.S. 857 (1955). More fundamentally, a federal statute creating subject matter jurisdiction for a certain class of cases will always set forth the criteria for identifying those cases. If the fact that the criteria are established by federal law were itself sufficient to establish a federal question for purposes of Article III, then Article III's limitation would be meaningless. The relevant question is whether the class of cases itself satisfies Article III (*i.e.*, whether the cases raise substantive questions of federal law), not whether the criteria for identifying those cases are set forth in a federal statute. *See Mesa, supra* (threshold determination of whether the official is acting "under color of office" not sufficient to establish jurisdiction in those cases in which official does not raise a federal defense).

Article III jurisdiction could be sustained, even under the United States' reading of the statute, if the Court ratifies a broad reading of *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1924). As this Court recently noted, "*Osborn* . . . reflects a broad conception of 'arising under' jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that *might* call for the application of federal law." *Verlinden*, 461 U.S. at 492 (emphasis added). Here, if the Attorney General's certification decision is sustained, then the case will call for the application of federal law (*i.e.*, it will be a suit against the United States under the FTCA). Thus, all cases in which certification has occurred "might" end up calling for the application of federal law because the certification "might" be upheld.

But this Court has twice declined to reaffirm the sweeping language of *Osborn*. *See Verlinden*, 461 U.S. at 492; *Mesa v. California*, 489 U.S. at 137. It would have to do so here, if it adopts the United States' reading of the statute. For, even though there *might* be a federal question in every certification case, in those cases removed from state court in which the district court rejects the Attorney General's certification, the underlying case or controversy will not, in fact, call for any application of federal law. And that fact will be clear, at the outset of the case, once the threshold issue of the propriety of the substitution is resolved.[17]

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[17] Once subject matter jurisdiction is properly established in federal court, that jurisdiction is not defeated by subsequent events. For example, if the plaintiff and defendant are diverse at the outset of the case, the fact that the plaintiff moves into the defendant's state after the case is commenced does not defeat jurisdiction. *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957).

One could argue that, when a case is removed to federal court pursuant to 28 U.S.C. § 2679(d)(2), the United States is at least conditionally substituted as a party and that jurisdiction, having

Moreover, even if the statute, as interpreted by the United States, could scrape by under Article III—even if the Court decides that the Attorney General's certification alone (invalid though it may be) provides "substance sufficient to confer subject matter jurisdiction on the court," *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)—there is no reason to believe that Congress wanted to push the constitutional envelope so far. Ordinarily, pendent jurisdiction is discretionary for a federal court, and the discretion is exercised hesitantly. *See id.* at 726 ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.").[18] It would be unprecedented for Congress to

"vest[ed]" at that time, "cannot be ousted by" the district court's subsequent overturning of the certification and resubstitution of the original defendant. *Ibid.* (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 546, 547 (1824)). The problem with that argument is that, if the certification decision is reviewable, it makes very little sense to think of the United States as having been substituted as defendant until the district court upholds the certification. If, in *Smith v. Sperling*, the Court had determined that the parties had not been diverse even at the outset, the case would have been dismissed. Jurisdiction would never have vested. Here, too, if substitution is denied because the certification is invalid, then jurisdiction was never properly established in the first place.

The situation is analogous to a removal under 28 U.S.C. § 1442 (a)(1) in which the district court determines that no federal defense is presented and must, therefore, remand the case to state court. The mere allegation that the defendant employee was acting "under color of federal law" is not sufficient to establish jurisdiction for Article III purposes. So too, here, the mere allegation that the defendant employee was acting "within the scope of his employment" is not sufficient to establish Article III jurisdiction *unless* certification is treated as conclusive. As long as certification is reviewable, the United States is not substituted as defendant, and the jurisdiction of the court does not vest, until the court itself determines scope of employment.

[18] Even the analogy with pendent jurisdiction is a weak one, since under Section 2679(d)(2) there are not two claims, one federal and one state, with the former falling by the wayside, and the latter

compel a district court to retain jurisdiction over a purely state law case, simply because, at the outset of the case, the validity of the Attorney General's certification had to be determined.

Under a natural reading of the statute, by contrast, no Article III difficulties are raised. "An action against a federal employee who has been certified as acting in the scope of her employment must proceed *exclusively* against the United States under the FTCA." *Mitchell v. Carlson*, 896 F.2d 128, 134 (5th Cir. 1990). In that instance, subject matter jurisdiction is clear—the case becomes "a claim under the FTCA." *Id.* at 136. It is only if, contrary to the plain language, certification is not conclusive for purposes of substitution, that an Article III problem arises.

Some courts have tried to escape this Article III problem by holding that the Attorney General's certification is not even conclusive for purposes of federal court jurisdiction. *See, e.g., Nasuti v. Scannell*, 906 F.2d at 808. This approach flies straight in the face of Section 2679(d)(2), which states that certification "shall conclusively establish scope of office or employment for purposes of removal." If certification is "conclusive" only until a federal court disagrees, then words have lost all meaning.

In *Nasuti*, the court tried to finesse the language of the statute by distinguishing between removal and remand. "While Congress provided that the Attorney General's certification conclusively establishes scope of employment for *removal* purposes," the Court explained (*id.* at 813), "that conclusive effect lasts only until the court speaks on the specific scope issue," in which case, if it finds the certification improper, it will remand the case to state court. Under the First Circuit's view, the only point of the "conclusive" language of Section 2679(d)(2) is to ensure

surviving. There is only one claim, and (under the United States' reading of the statute) the district court has to determine at the outset: is it a federal claim or only a state one? For the Court to decide the latter and yet be compelled to retain the case bears no resemblance to any statutory scheme with which we are familiar.

that "the federal defendant's scope status is resolved by a federal, not a state tribunal." *Ibid. Accord, S.J. & W. Ranch, Inc.*, 913 F.2d at 1544.

But any such "construction—distinguishing removal from remand—is," as the D.C. Circuit has noted, "quite unconvincing." *Kimbro v. Velten*, 30 F.3d at 1510 n.6. Federal courts always provide the forum to determine their own jurisdiction. Every removal petition is "conclusive" in the sense that it guarantees that the choice of forum "is resolved by a federal, not a state tribunal" (*Nasuti v. Scannell*, 906 F.2d at 813). *See* 28 U.S.C. § 1446 (permitting defendant in state court suit to file removal petition in federal district court and requiring district court to determine propriety of removal petition). Federal courts always provide the forum for determining the propriety of removal. Congress must, therefore, have meant more than that by stating that certification will "conclusively" establish scope of employment for purposes of removal. What Congress must have meant is what the words plainly state: that the certification is non-reviewable; that the case, once removed, cannot be remanded to state court.

At the very least, therefore, it is clear (as the United States concedes) that "certification" conclusively establishes a federal forum for the entire case. This Court, then, cannot escape the Article III issue if it accepts the United States' position that certification is not conclusive for purposes of substitution.

In *Mesa*, this Court declined to adopt a perfectly plausible reading of a statute urged by the United States because it raised serious Article III questions. *Mesa* at 137 (citing *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979) ("[I]f 'a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided,' *Crowell v. Benson*, 285 U.S. 22, 62 (1932), a court should adopt that construction")). Certainly, then, the Court should decline the United States' invitation here unnecessarily to distort the language of the statute, to

twist its structure, to ignore its history and its underlying policies, and to trample on basic principles of agency law, all in order to reach a result that itself raises serious constitutional concerns.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

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PUBLIC LAW 87-258-SEPT. 21, 1961

Public Law 87-258

AN ACT

To amend title 28, entitled "Judiciary and Judicial Procedure", of the United States Code to provide for the defense of suits against Federal employees arising out of their operation of motor vehicles in the scope of their employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2679 of title 28, United States Code, is amended (1) by inserting the subsection symbol "(a)" at the beginning thereof and (2) by adding immediately following such subsection (a) as hereby so designated, four new subsections as follows:

"(b) The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for personal injury, including death resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

"(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to

whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

"(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

"(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect."

SEC. 2. The amendments made by this Act shall be deemed to be in effect six months after the enactment hereof but any rights or liabilities then existing shall not be affected.

Approved September 21, 1961.